Supreme Court, U.S.
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No.

In The
Supreme Court of the United States
October Term, 1996

MARK ANTHONY MOSES,
Petitioner,

v.

AMERICAN NONWOVENS, INC.,
Respondent.

Petition For Writ Of Certiorari To The United States Court of Appeals For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether, in an action brought under the Americans with Disabilities Act ("ADA"), the employer bears the burden of proving that an employee is a "direct threat" to himself and others in the workplace or, alternatively, whether the employee bears the burden of proving that he is not a "direct threat" to himself and others in the workplace.

PARTIES

Petitioner, Mark Anthony Moses, is an individual who resides in the State of Alabama and contends that he was subjected to unlawful discrimination in violation of the Americans with Disabilities Act. Respondent, American Nonwovens, Inc., is a corporation which operated a textile facility in Vernon, Alabama.

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported: *Moses v. American Nonwovens, Inc., 97 F.3d 446* (11th Cir. 1996). This Opinion is set forth at Appendix A. The United States District Court for the Northern District of Alabama, Western Division, did not issue an opinion. The District Court simply stamped the word "granted" on a copy of the Respondent's motion papers. A reasonable facsimile of the action taken by the District Court is attached as Appendix B.

JURISDICTION

The judgment sought to be reviewed was entered by the Eleventh Circuit Court of Appeals on September 27, 1996. This judgment is set forth in Appendix C. This Court has jurisdiction to review the judgment of the Eleventh Circuit under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

a) The Americans with Disabilities Act, 42 U.S.C. § 12101 is reproduced in Appendix D due to the length of the ADA.

b) Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITIONS BELOW.

On September 20, 1994, Mark Anthony Moses ("Moses"), a resident of Alabama, filed a Complaint against American Nonwovens, Inc. ("American Nonwovens") in the United States District Court for the Northern District of Alabama, Western Division. The Complaint alleged, among other things, that American Nonwovens unlawfully terminated Moses' employment in violation of the Americans with Disabilities Act and also failed to provide a reasonable accommodation for his disability, i.e. epilepsy. Although the

Complaint purported to state a cause of action under The Rehabilitation Act of 1973, 29 U.S.C. § 794 et seq., such claim has been abandoned. Accordingly, Moses' claim is solely under the Americans with Disabilities Act.

On October 25, 1994, American Nonwovens timely answered the Complaint and set forth certain affirmative defenses. Subsequently, American Nonwovens filed a Motion for Summary Judgment and on July 21, 1995, the District Court stamped the Motion with the words "granted." No opinion was written by the District Court. Moses timely filed a Notice of Appeal on August 17, 1995.

On September 27, 1996, the United States Court of Appeals for the Eleventh Circuit affirmed the District Court's entry of summary judgment. The Petitioner asserts this Petition for Writ of Certiorari and this Court has jurisdiction pursuant to 28 U.S.C. § 1254.

B. FACTS

Moses is a twenty-nine year old male who suffers from epilepsy. Since birth, Moses has suffered from eight seizures. Moses takes medication for his epileptic seizures.

Respondent American Nonwovens, Inc. ("American Nonwovens") is a manufacturer of nonwoven fabrics that, at the time the case was filed, maintained a production facility in Vernon, Alabama. American Nonwovens hired Moses through a temporary services agency on or about April, 1993.

Before starting work, Moses informed American Nonwovens that he took medicine to control epileptic

seizures. American Nonwovens nevertheless hired Moses to perform the duties of product inspector, web operator, and hot splicer assistant. There is no evidence that Moses did not perform these jobs well.

The product inspectors' job required Moses to sit in a chair on a slightly raised metal platform that overlooked a moving press roller. The platform was surrounded with guard rails. For Moses to sustain injury during a seizure, he would have to fall forward over the guard rail and into the press roller at a point where the fabric on the press roller is moving "upstream."

The web operator position requires the operator to sit in a chair underneath a press roller. The employee is shielded from the equipment by a large metal guard. The web operator's duties consist of using a juggling motion to pull fabric down.

The hot splicer assistant assisted in identifying defects in the fabric moving on the press roller and splicing them with an industrial splicing machine. The splicing machine is open and exerts 100 pounds of pressure and heats to 350°F. There is no evidence in the record as to safety devices surrounding the splicer machine.

Danny Avery, Moses' manager, testified that accidents around the machinery can be avoided by having employees work "downstream" from the movement of the fabric across the press rollers. Working "downstream" allows any employee touching the equipment at any point to be pushed away from the machinery rather than being pulled into the machinery. The only accident described by Avery was one in which an employee, other than Moses, was

violating the work rules by working "upstream," that is, against movement of the fabric running through the machinery. That worker was drawn into the machinery and was injured.

Alexandre Todorov, M.D., is Moses' primary treating physician. Dr. Todorov graduated from the University of Geneva, Switzerland and is a diplomate in neurology with the Swiss Medical Association and with the American Board of Neurology and Psychiatry. Dr. Todorov is board certified in both neurology and psychiatry, with additional qualifications in neurophysiology, which he described as an area of medicine dealing with epileptic seizures. Dr. Todorov is an expert on epilepsy and epileptic seizures.

Dr. Todorov testified that with medication, he expected Moses to have a seizure every one to two years. Dr. Todorov testified that Moses was able to work, that there are "...really no limitations in what a person can do if he has epilepsy - the only limitation I suggest is use of common sense to protect him in the case of a seizure."

Dr. Todorov also testified that if Moses' work station was on conveyor machinery, which would push him away from the machinery if he fell into it, there would be no risk or work restrictions. Further, Dr. Todorov's medical records reveal that Moses could do assembly line or construction jobs and had a history of performing those jobs. When asked whether there was risk if Moses was working over exposed machinery with steel rollers, Dr. Todorov replied that there was risk, but did not quantify and was not asked to quantify the degree of risk. In addition to the assembly line jobs, Dr. Todorov did not express any

objection to Moses working as a heavy equipment mechanic 36 to 65 hours per week.

Two other physicians submitted written declarations to the trial court. R. William Davis, M.D., a personal friend of Danny Avery (Moses' supervisor), testified that he had seen the equipment and that it was unsafe for Moses to work around the equipment. There is no evidence that Dr. Davis was familiar with the functions of the equipment, the safety features of the equipment, the work rules about remaining "downstream" from the movement of the fabric or other safety rules or how they related to Moses' job functions when the machinery was running. Dr. Gary Magouirk, a family practice resident, testified similarly as to Dr. Davis in a written declaration. There is no evidence that Dr. Magouirk knew of any of the particulars of Moses' job, nor was there any evidence that Dr. Magouirk had any particular expertise in epilepsy or vocational rehabilitation medicine.

Four months after starting work with American Nonwovens, Moses suffered an epileptic seizure away from work at an auto supply store. The seizure occurred on August 17, 1993 and Moses submitted a doctor's excuse on August 18, 1993.

On August 25, 1993, Moses went to the plant to discuss his working hours with plant management. He was referred to an individual known to him only as "Alan," the plant's production manager at the time. Alan informed Moses that he had no problem with the request for reducing the amount of hours and that he would "get with" Danny Avery and that American Nonwovens would work it out and telephone Moses. On August 26, 1993, Moses was sent by American Nonwovens to Key Employment in Columbia,

Mississippi to pick up his pay check. While there, Dorothy Hopper, an official of Key Employment, told Moses, "I, Avery, and Alan think you are a threat to yourself. You are a good worker, but we have to let you go."

There is no evidence in the record that before terminating Moses American Nonwovens attempted to investigate any reasonable accommodations or discuss the issue of reasonable accommodation with Moses. There is no evidence in the record that American Nonwovens checked or consulted with Moses' physicians or any vocational rehabilitation specialist. Management at American Nonwovens had no discussion with Moses about whether his medical condition would allow him to safely perform the functions or whether there was a reasonable accommodation which would allow Moses to perform the functions of the job. There is no evidence that American Nonwovens, before making their decision to terminate Moses, spoke with Dr. Todorov, Dr. Davis or Dr. Magouirk or any other medical professional. There is no evidence that any other management personnel at American Nonwovens understood what occurred during a seizure or what the effects of epilepsy were.

Moses thereafter timely filed a charge of discrimination with the Equal Employment Opportunity Commission and filed this action on September 20, 1994. Thereafter, the trial court granted summary judgment without discussion and the Eleventh Circuit Court of Appeals affirmed.

The Eleventh Circuit issued a written opinion. The Eleventh Circuit held that, "The employee retains at all times the burden of persuading the jury either that he was not a

direct threat or that reasonable accommodations were available."

In placing the burden on proof on the employee to prove that he was not a direct threat or that reasonable accommodations were available, the Eleventh Circuit cited as authority, *Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1112* (8th Cir. 1995), and *St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506-13, 113 S.Ct. 2742, 2747-50, 125 L.Ed.2 407* (1993). Moses now seeks a Writ of Certiorari from this Court because the Fifth and Seventh Circuits specifically disagree with the Eleventh Circuit and place the burden of proof on the "direct threat" issue upon the employer, not the employee.

REASONS FOR ALLOWANCE OF THE WRIT

I. THERE IS A SPLIT OF AUTHORITY BETWEEN THE ELEVENTH CIRCUIT AND THE FIFTH AND SEVENTH CIRCUITS AS TO WHETHER THE EMPLOYEE OR THE EMPLOYER BEAR THE BURDEN OF PROOF ON THE QUESTION OF WHETHER THE EMPLOYEE IS A "DIRECT THREAT" TO HIMSELF OR OTHERS IN THE WORKPLACE.

In its opinion in this case, the Eleventh Circuit held:

> The employee retains at all times the burden of persuading the jury either that he was not a direct threat or that reasonable accommodations were available. *(App. 2).*

The Fifth and Seventh Circuits unequivocally disagree with the Eleventh Circuit. *Rizzo v. Childrens' World Learning Centers, Inc., 84 F.3d 758, 763* (5th Cir. 1996). The Fifth Circuit stated:

> Whether one is a direct threat is a complicated, fact intensive determination, not a question of law. To determine whether a particular individual performing a particular act opposes a direct threat to others is a matter for the trier fact to determine after weighing all of the evidence about the nature of the risk and the potential harm.
>
> ***As with all affirmative defenses, the employer bears the burden of proving that the employee is a direct threat. See Interpretative Guidance to 29 C.F.R. § 1630.15(b)(c).*** *(Emphasis added.)*

Similarly, the Seventh Circuit agrees with the Fifth Circuit and has placed the burden of proof on the employer on the direct threat issue. *EEOC v. AIC Security Investigations, Ltd., 55 F.3d 1276* (7th Cir. 1995). In *AIC*, the Seventh Circuit approved, in pertinent part, a jury instruction placing the burden of proof upon the employer regarding the direct threat issue:

> It is the defendant's defense that [the employee] posed a threat to the health and safety of himself or others in the workplace. You may find that [employee] posed a direct threat only if the defendants have proven by a preponderance of the evidence that, more

> likely than not, [employee] in the performance of an essential function of his job posed a significant or substantial harm to himself or others in the workplace that could not be eliminated or reduced by reasonable accommodation.

AIC, 55 F.3d at 1283-84.

Although the Seventh Circuit disapproved part of the above instruction as redundant, it approved the substance of the instruction placing the burden of proof on the "direct threat" issue upon the employer.

Thus, the rule of law announced by the Eleventh Circuit in the instant case is directly contradicted by both the Fifth and Seventh Circuits.

The Eleventh Circuit's rationale for requiring the plaintiff to prove that he is not a "direct threat," that he is a significant risk to the health and safety of others in the workplace, lies on how that court allocates the plaintiff's initial burden of proof. Under the ADA, a plaintiff must establish that he is a "qualified person with a disability." The term "qualified person with a disability" is defined in both Section 504 and the ADA as a person who can perform the essential functions of the job with or without a reasonable accommodation. *(App. 13).* Thus, a plaintiff must first prove that he can perform the essential functions of the job with or without a reasonable accommodation in order to prove unlawful discrimination.

The Eleventh Circuit, however, requires an employee to prove an additional element. The Eleventh Circuit

requires an employee to prove that he can perform the essential functions of the job "...without risk of serious harm to oneself or others." *Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1126* (11th Cir. 1993).

The additional requirement that a plaintiff prove that he can perform the essential function of the job without risk of serious harm to himself or others is virtually indistinguishable from the definition of a direct threat under the ADA. Under the ADA, a person is a "direct threat" if he poses a "significant risk to the health or safety of others that cannot be eliminated by a reasonable accommodation." *(App. 11)*. By requiring the plaintiff to prove that he can perform the essential functions of the job without serious risk of harm to himself or others, the Eleventh Circuit has incorporated the "direct threat" issue into the plaintiff's initial burden of proof.

In other words, under the Eleventh Circuit's approach, the employer does not have to prove that the employee is unsafe; the employee must prove that he is not unsafe.

While this approach may well be the rule in Section 504 cases, *School Board of Nassau County v. Arline, 480 U.S. 273, 287, n.16 107 S.Ct. 1123, 1131, 94 L.Ed.2d 307,* (1987), it is directly contrary to Congress' express intention in enacting the ADA. In the first instance, Congress made the question of whether an employee was a "direct threat" a defense under the ADA. *(App. 22, 42 U.S.C. § 12113(b))*. Second, the House-Senate Conference Committee expressly stated in its report that the employer bears the burden of persuading the jury that the employee is a "direct threat," that is, that the employee is a "significant risk" to workplace

safety. *Conference Report on Senate, 933, the Americans with Disabilities Act: Joint Explanatory Statement of the Committee of Conference, House Rep. No. 596, 101st Cong. 2d. Sess. at 60 (1990), reprinted in 136 Cong. Rec. H.4582, 4598 (Daily Ed. July 12, 1990).*

Because the Eleventh Circuit disagrees with the Fifth and Seventh Circuits on the question of the plaintiff's burden of proof on the "direct threat" issue, this Court should settle this issue by providing clear direction as to whether the plaintiff's initial burden of proof includes a requirement that the employee can perform the essential function of the job without a risk of serious physical injury to himself or others, or whether the "direct threat" issue is an affirmative defense upon which the employer bears the burden of proof.

II. THE HOUSE SENATE CONFERENCE COMMITTEE SPECIFICALLY STATED THE BURDEN OF PROOF ON THE DIRECT THREAT ISSUE IS UPON THE EMPLOYER, NOT THE EMPLOYEE, THUS CONTRADICTING THE ELEVENTH CIRCUIT'S HOLDING IN THE INSTANT CASE.

The ruling in Moses that "the employee retains the burden of persuading the jury that either he was not a direct threat or that reasonable accommodations were available" is directly contradicted by the House Senate Conference Committee's statement that the employer, not the employee, bears the burden of proof on the "direct threat" issue.

Conference Report on S.933, The Americans with Disabilities Act: Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No.596, 101st. Cong., 2d. Sess. at 60 (1990), reprinted in 136 Cong. Rec. H.4582, 4598 (Daily Ed. July 12, 1990).

In its report, the Conference Committee stated as follows:

> The Senate bill includes as a defense that a covered entity may fire or refuse to hire a person with a contagious disease if the individual poses a direct threat to the health and safety of other individuals in the workplace.
> The House amendment makes this specific defense applicable to all applicants and employees, not just to those with contagious diseases.
> The Senate recedes. The conferees intend that the term "qualification standard" as used in section 103(b) permits a requirement that an individual with a disability not pose a direct threat to the health or safety of other individuals in the workplace if reasonable accommodation will not eliminate the direct threat. In addition, the conferees concur with the House provision that defines "direct threat" to mean "significant risk" (section 101(3)). The qualification standard in section 103(b) and the definition in section 101(3) clearly spell out the right of the employer to take action to protect the rights of its employees and other individuals in the

> workplace. Such employer action would include not assigning an individual to a job if such an assignment would pose a direct threat to individuals in the workplace and such a threat could not be eliminated by reasonable accommodation. The conferees incorporate by reference the explanations of the term "direct threat" set out in Senate Report No. 101-116. Consistent with this explanation, in determining what constitutes a significant risk, the conferees intend that the employer may take into consideration such factors as the magnitude, severity, or likelihood of risk to other individuals in the workplace and *that the burden would be on the employer to show the relevance of such factors in relying on the qualification standard. (Emphasis added.)*

Because the Eleventh Circuit Court of Appeals has decided an important question of federal law in a way that conflicts with the express will of Congress, this Court should review the Eleventh Circuit's decision.

In addition, the holding in Moses is contrary to the Equal Employment Opportunity Commission's interpretation of the Americans with Disabilities Act. *See Interpretative Guidance at 29 C.F.R. § 1630.15 (b) and (c).* This Court has previously held that the EEOC guidelines, while not controlling, "...constitute a body of experience and informed judgment which courts and litigants may properly resort for guidance." *General Elec. Co. v. Gilbert, 429 U.S. 125, 97 S.Ct. 401, 410-11, 50 L.Ed.2d 343 (1976).* Thus, the Eleventh Circuit's decision conflicts with the express guidelines of the Equal Employment Opportunity

Commission. This provides another important reason for granting the Writ of Certiorari in this case.

It should also be noted that the Eleventh Circuit's decision is also in conflict with a noted treatise on the Americans with Disabilities Act and with the American Bar Association's model and jury instructions on the direct threat issue. *See*, Jonathan R. Mook, *Americans with Disabilities Act: Employer Rights, Employer Obligations § 4.05[2] (1994) (Employer has the burden of proving an employee is a "direct threat"). See also, ABA Model Jury Instruction for Employment Cases, No. 1.06[4][b].*

Both this Court and the Eleventh Circuit have recognized the importance of burden of proof in employment discrimination cases. *See generally, St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993) (Title VII); Arline v. School Board of Nassau County, 772 F.2d 759, 765 n.12 (11th Cir. 1985), aff'd 480 U.S. 273 (1987).* The question of workplace safety is critical to employers who are responsible to other employees and the public. The issue is also critical to workers with disabilities because as the Ninth Circuit has stated, "[a]ny qualification based on risk of future injury must be examined with special care if the [Act] is not to be circumvented easily, since almost all handicapped persons are at greater risk from work-related injuries." *Bentivegna v. United States Dept. of Labor, 694 F.2d 619, 622 (9th Cir. 1982).*

The instant case presents this Court with an opportunity to clarify the burden of proof in ADA cases and to ensure that the burden of proof on the "direct threat" issue is allocated to the proper party. Moses requests that this

Court grant this petition and issue the Writ of Certiorari to the Eleventh Circuit.

IV. CONCLUSION

For the foregoing reasons, the Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

MARK ANTHONY MOSES,
Plaintiff-Appellant,

v.

AMERICAN NONWOVENS, INC.,
Defendant-Appellee.

No. 95-6677.

United States Court of Appeals,
Eleventh Circuit.

Sept. 27, 1996.

Appeal from the United States District Court for the Northern District of Alabama.

Before EDMONDSON and DUBINA, Circuit Judges, and FARRIS [FN*], Senior Circuit Judge.

FN* Honorable Jerome Farris, Senior U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

PER CURIAM:

Mark Moses has epilepsy. He brought a claim against American Nonwovens, Inc. alleging that it fired him in violation of the Americans with Disabilities Act. 42 U.S.C. § 12101 et seq. Moses appeals the district court's summary judgment. We have jurisdiction. 28 U.S.C. § 1291. We affirm.

[1] To defeat a motion for summary judgment, the nonmoving party may not rely on "mere allegations." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986) (citation omitted). It must raise "significant probative evidence" that is "sufficient" for the jury "to return a verdict for that party." Id. at 249, 106 S.Ct. at 2510. Summary judgment may be granted if the evidence is "merely colorable." Id.

[2] The ADA provides that an employer may not "discriminate against a qualified individual with a disability because of the disability ... in regard to ... [the] discharge of employees...." 42 U.S.C. § 12112(a). An employer may fire a disabled employee if the disability renders the employee a "direct threat" to his own health or safety. 42 U.S.C. §§ 12113(a), (b); see also 29 C.F.R. § 1630.2(r). But there is no direct threat defense if the employer could have made "reasonable accommodation[s]." 42 U.S.C. § 12113(a). The employee retains at all times the burden of persuading the jury either that he was not a direct threat or that reasonable accommodations were available. See Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1112 (8th Cir.1995) (citing St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506-13, 113 S.Ct. 2742, 2747-50, 125 L.Ed.2d 407 (1993)).

American admits that it fired Moses because of his epilepsy, and Moses does not deny that there was a significant risk that if he had continued working at American, he would have had seizures on the job. The issues are whether Moses produced evidence from which a reasonable jury could conclude (1) that he was not a direct threat or (2) that reasonable accommodations were available.

[3] Moses failed to produce probative evidence that he was not a direct threat. Each of Moses's assigned tasks presented grave risks to an employee with a seizure disorder. As a product inspector, Moses sat on a platform above fast-moving press rollers. As a web operator, he sat underneath a conveyer belt with in-running pinch-points. And as a Hot Splicer Assistant, he worked next to exposed machinery that reached temperatures of 350 degrees Fahrenheit. Moses maintains that as long as he followed instructions and worked "downstream' from the equipment, there was no risk of harm. But the only supporting evidence to which he points is the deposition of Danny Avery, a manager at American, who stated that he always warned new employees that they should work "upstream" from the motion of the equipment so that it would "push you out of it rather than pull you into it." This testimony is insufficient: first, Avery suggests that it was more dangerous to work downstream, but he does not imply that it would be safe for epileptics to work upstream; second, Avery is referring to work on a specific machine, not to all of the tasks Moses was expected to perform.

[4] Even though there is no genuine issue of material fact as to whether Moses was a direct threat, he could still defeat American's motion by producing probative evidence that reasonable accommodations were available. But Moses points to no probative evidence suggesting that American could have made his work sites safe.

Moses's primary arguments are that American failed to investigate his condition and failed to consider possible accommodations. Neither is persuasive. When American fired Moses, it knew he was taking medication for his epilepsy but that his medication was not controlling his seizures. This is not a case like Kelley v. Bechtel Power

Corp., 633 F.Supp. 927 (S.D.Fla.1986), in which the employee, although diagnosed as epileptic, had never suffered a seizure, and the employer had no basis for concluding that he was likely to suffer one. Id. at 933 (interpreting the Florida Human Rights Act).

We are more troubled by the evidence that American failed to investigate possible accommodations. No language in the ADA mandates a pretermination investigation, but the EEOC advises that "the employer must determine whether a reasonable accommodation would ... eliminate" the direct threat. 29 C.F.R. §§ 1630.2(r), 1630.9, Interp. Guidance. We are persuaded that American's failure to investigate did not relieve Moses of his burden of producing probative evidence that reasonable accommodations were available. A contrary holding would mean that an employee has an ADA cause even though there was no possible way for the employer to accommodate the employee's disability. Stated differently: An employer would be liable for not investigating even though an investigation would have been fruitless. We are confident that although the ADA does not mandate a pretermination investigation, the possibility of an ADA lawsuit will, as a matter of practice, compel most employers to undertake such an investigation before terminating a disabled employee.

The district court did not err in granting American's motion for summary judgment.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-6677

D.C. Docket No. CV-94-C-2297-W

MARK ANTHONY MOSES,

Plaintiff-Appellant,

vs.

AMERICAN NONWOVENS, INC.,

Defendant-Appellee.

Appeal from the
United States District Court
for the Northern District of Alabama

Before EDMONDSON and DUBINA, Circuit Judges, and FARRIS*, Senior Circuit Judge.

JUDGMENT

(Filed September 27, 1996)

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

It is further ordered that Plaintiff-Appellant pay Defendant-Appellee the costs on appeal to be taxed by the Clerk of this Court.

---

*Honorable Jerome Farris, Senior U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

Entered: September 27, 1996
For the Court: Miguel J. Cortez, Clerk

By: /s/ Karleen McNoer
Deputy Clerk

ISSUED AS MANDATE: 10/31/96

A True Copy
Attested: Clerk,
U.S. Court of Appeals,
Eleventh Circuit
By: /s/ Anthony Ricciardi
Deputy Clerk
Atlanta, Georgia

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

GRANTED
U.W. Clemon 7/21/95
JUDGE DATE

MARK ANTHONY MOSES

Plaintiff,

ENTERED
July 21, 1995
swb

v.

AMERICAN NONWOVENS, INC.,

Defendant.

CIVIL ACTION NO. CV-94-C-2297-W

AND

MARK ANTHONY MOSES,

Plaintiff,

v.

KEY EMPLOYMENT SERVICES,

Defendant.

CIVIL ACTION NO. CV-95-C-1272-W

MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, defendant American Nonwovens, Inc. hereby respectfully moves this court to enter judgment as a matter of law in its favor on plaintiff's claims under both the Americans With Disabilities Act and the Rehabilitation Act. After considerable discovery, the undisputed facts establish that there is no genuine issue of material fact as to facts relevant to the determination of plaintiff's claims.

Therefore, based on the consideration of the facts in the light most favorable to the plaintiff as the nonmovant along with the legal arguments set forth in defendant's brief, filed contemporaneously herewith, defendant requests that the Court enter judgment as a matter of law in favor of the defendant American Nonwovens, Inc. on both plaintiff's Americans With Disabilities Act claim and the Rehabilitation Act claim.

Defendant also requests that the Court expressly direct that any such order granting summary judgment as to defendant American Nonwovens, Inc. be entered as a final judgment pursuant to Federal Rule of Civil Procedure 54(b), based on the Court's determination that there is no just reason for delaying the entry of this order as a final judgment.

/s/ John J. Coleman
One of the Attorneys for Defendant
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CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing upon the following each of the following, attorneys of record:

James A. Hall, Esq.
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and

Barry V. Frederick, Esq.
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by forwarding copies thereof through the United States mail, first-class postage prepaid and properly addressed, on this the 30th day of June, 1995.

/s/ John J. Coleman
OF COUNSEL

ATTEST: A TRUE COPY
Perry D. Mathis, Clerk
United States District Court
Northern District of Alabama
By: /s/ Shirley Brown
Deputy Clerk [SEAL]

APPENDIX D

AMERICANS WITH DISABILITIES ACT

SUBCHAPTER I-EMPLOYMENT

§ 12111. Definitions.

As used in this subchapter:

(1) **Commission.** The term "Commission" means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964 (42 U.S.C. 20OOe-4).

(2) **Covered entity.** The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) **Direct threat.** The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) **Employee.** The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) **Employer.**

(A) **In general.** The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more

calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) **Exceptions.** The term "employer" does not include-

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of title 26.

(6) **Illegal use of drugs.**

(A) **In general.** The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 812). Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(B) **Drugs.** The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C. 812].

(7) **Person, etc.** The terms "person", "labor organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e).

(8) **Qualified individual with a disability.** The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) **Reasonable accommodation.** The term "reasonable accommodation" may include-

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) **Undue hardship.**

(A) **In general.** The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) **Factors to be considered.** In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include-

(i) the nature and cost of the accommodation needed under this chapter;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

§ 12112. Discrimination.

(a) **General rule.** No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) **Construction.** As used in subsection (a) of this section, the term "discriminate" includes-

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration-

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5) (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation

would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory,

manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) **Covered Entities in Foreign Countries.**

(1) **In general.** It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) **Control of corporation.**

(A) **Presumption.** If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) **Exception.** This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) **Determination.** For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on -

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control, of the employer and the corporation.

(d) **Medical examinations and inquiries.**

(1) **In general.** The prohibition against discrimination as referred to in subsection

(a) of this section shall include medical examinations and inquiries.

(2) **Preemployment.**

(A) **Prohibited examination or inquiry.** Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) **Acceptable inquiry.** A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) **Employment entrance examination.** A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if-

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that-

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(4) **Examination and inquiry.**

(A) **Prohibited examinations and inquiries.** A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) **Acceptable examinations and inquiries.** A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make

inquiries into the ability of an employee to perform job-related functions.

(C) **Requirement.** Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

§ 12113. Defenses.

(a) **In general.** It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) **Qualification standards.** The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

(c) **Religious entities.**

(1) **In general.** This subchapter shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation,

association, educational institution, or society of its activities.

(2) **Religious tenets requirement.** Under this subchapter, a religious organization may require that all applicants and employees conform to the religious tenets of such organization.

(d) List of infectious and communicable diseases.

(1) **In general.** The Secretary of Health and Human Services, not later than 6 months after July 26, 1990, shall-

(A) review all infectious and communicable diseases which may be transmitted through handling the food supply;

(B) publish a list of infectious and communicable diseases which are transmitted through handling the food supply;

(C) publish the methods by which such diseases are transmitted; and

(D) widely disseminate such information regarding the list of diseases and their modes of transmissibality to the general public.

Such list shall be updated annually.

(2) **Applications.** In any case in which an individual has an infectious or communicable disease that is transmitted to others through the handling of food, that is included on the list developed by the Secretary of Health and Human Services under paragraph (1), and which cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling.

(3) **Construction.** Nothing in this chapter shall be construed to preempt, modify, or amend any State, county, or local law, ordinance, or regulation applicable to food handling which is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, which cannot be eliminated by reasonable accommodation, pursuant to the list of infectious or communicable diseases and the modes of transmissability published by the Secretary of Health and Human Services.

§ 12114. Illegal use of drugs and alcohol

(a) **Qualified individual with a disability.** For purposes of this subchapter, the term "qualified individual with a disability" shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) **Rules of construction.** Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who-

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

(c) **Authority of covered entity.** A covered entity-

(1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);

(4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee; and

(5) may, with respect to Federal regulations regarding alcohol and the illegal use of drugs, require that-

(A) employees comply with the standards established in such regulations of the Department of Defense, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Defense);

(B) employees comply with the standards established in such regulations of the Nuclear Regulatory Commission, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Nuclear Regulatory Commission); and

(C) employees comply with the standards established in such regulations of the Department of Transportation, if the employees of the covered entity are employed in a transportation industry subject to such regulations, including complying with such regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Transportation).

(d) **Drug testing.**

(1) **In general.** For purposes of this subchapter, a test to determine the illegal use of drugs shall not be considered a medical examination.

(2) **Construction.** Nothing in this subchapter shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.

(e) **Transportation employees.** Nothing in this subchapter shall be construed to encourage, prohibit, restrict, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to-

(1) test employees of such entities in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs and for on-duty impairment by alcohol; and

(2) remove such persons who test positive for illegal use of drugs and on-duty impairment by alcohol pursuant to paragraph (1) from safety-sensitive duties in implementing subsection (c) of this section.

§ 12115. Posting notices.

Every employer, employment agency, labor organization, or joint labor management committee covered under this subchapter shall post notices in an accessible format to applicants, employees, and members describing the applicable provisions of this Act, in the manner prescribed by section 711 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-10).

§ 12116. Regulations.

Not later than 1 year after July 26, 1990, the Commission shall issue regulations in an accessible format to carry out this subchapter in accordance with subchapter II of chapter 5 of title 5.

§ 12117. Enforcement.

(a) **Powers, remedies, and procedures.** The powers, remedies, and procedures set forth in sections 705, 706, 707, 709, and 710 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9) shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

(b) **Coordination.** The agencies with enforcement authority for actions which allege employment discrimination under this subchapter and under the Rehabilitation Act of 1973 [29 U.S.C. 701 et seq.] shall develop procedures to ensure that administrative complaints filed under this subchapter and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same

requirements under this subchapter and the Rehabilitation Act of 1973. The Commission, the Attorney General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attorney General at part 42 of title 28 and part 1691 of title 29, Code of Federal Regulations, and the Memorandum of Understanding between the Commission and the Office of Federal Contract Compliance Programs dated January 16, 1981 (46 Fed. Reg. 7435, January 23, 1981)) in regulations implementing this subchapter and Rehabilitation Act of 1973 not later than 18 months after July 26, 1990.